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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 188

MABEL MALOTTE,
Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

Appeal from the Supreme Court of California.

JURISDICTIONAL STATEMENT.

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THE PEOPLE OF THE STATE OF CALIFORNIA,
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Appeal from the Supreme Court of California.

JURISDICTIONAL STATEMENT.

The appeal is from the judgment of the Supreme Court of California entered January 27, 1956, in a criminal action and this Jurisdictional Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

THE OPINION BELOW.

The opinion of the California Supreme Court is reported as 46 A.C. 57, 282 P. 2d 517. Copies of the majority and dissenting opinions are attached hereto as Appendix A.

JURISDICTION.

1. Appellant was convicted in the trial court of the crime of felony, to wit, conspiracy to violate a local ordinance having reference to prostitution, and of the crime of misdemeanor, to wit, contributing to the delinquency of a minor. She was sentenced to imprisonment in a State prison for women for the term prescribed by law on the felony conviction, and to imprisonment in a county jail for one year on the misdemeanor conviction, the sentences running concurrently. The appeal here is from the final judgment of the Supreme Court of California affirming the judgment of conviction and the order denying appellant a new trial.

2. The judgment of the California Supreme Court was entered January 27, 1956. Appellant's petition for rehearing was denied February 21, 1956. Her notice of appeal to this Court was filed with the Clerk of the California Supreme Court on April 23, 1956.

3. The jurisdiction of this Court upon appeal is conferred by 28 U.S.C., §1257(2). The decision of the California Supreme Court is challenged because there was drawn in question on the appeal before that court

the validity of state statutes on the ground of their being repugnant to the Constitution and laws of the United States, and the decision of the California Supreme Court was in favor of their validity.

4. Jurisdiction of this Court on appeal is sustained by *Williams v. Bruffy*, 96 U.S. 176, 183, 24 L. Ed. 716; *Winters v. People of State of New York*, 333 U.S. 507, 514, 68 S. Ct. 665, 669, 92 L. Ed. 840; *Poulos v. State of New Hampshire*, 345 U.S. 395, 402, 73 S. Ct. 760, 765, 97 L. Ed. 1105.

STATUTES INVOLVED.

Federal Communications Act (48 Stat. 1103, June 19, 1934, c. 652, §605; 47 U.S.C., §605):

> "(N)o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; . . ."

California Constitution (§11, Article I):

> "All laws of a general nature shall have uniform operation."

California Constitution (§25, Article IV):

> "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * *
>
> Second—For the punishment of crimes and misdemeanors."

California Penal Code, §182:

"If two or more persons conspire:

1. To commit any crime. * * *

They are punishable as follows: * * *

(T)hey shall be punishable by imprisonment in the county jail for not more than one year, or in the state prison for not more than three years, or by a fine not exceeding five thousand dollars ($5,000) or both."

California Penal Code, §640:

"Every person who, by means of any machine, instrument, or contrivance, or in any other manner, wilfully and fraudulently, or clandestinely taps, or makes an unauthorized connection with any telegraph or telephone wire, line, cable, or instrument under the control of any telegraph or telephone company; or who wilfully and fraudulently, or clandestinely, or in any unauthorized manner, reads . . . any message, report, or communication while the same is in transit or passing over any telegraph or telephone wire, line, or cable, or is being sent from, or received at any place within this State; or who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained; or who aids, agrees with, employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any of the acts or things hereinabove mentioned, is punishable by imprisonment in the state prison not exceeding five years, or by imprisonment in the county jail not exceeding one year, or by fine not exceeding five thousand dollars ($5,000), or by both such fine and imprisonment."

California Welfare and Institutions Code, §702:

"Any person who commits any act or omits the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of 21 years to come within the provisions of any of the subdivisions of Section 700 (defining juvenile delinquents) or which act or omission contributes thereto . . . is guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in the county jail for not more than two years, or by both such fine and imprisonment, or may be released on probation for a period not exceeding five years."

Municipal Code of San Francisco (Police Code, §240):

"Every person is guilty of a misdemeanor who:

(a) Offers or agrees to commit any lewd or indecent act or any act of prostitutions (sic); or

(b) Offers to secure another for the purpose of committing any act of prostitution, fornication, assignation or for any other lewd or indecent act with any other person; or

(c) Is in or near any thoroughfare or public place for the purpose of inducing, enticing or procuring another to commit any act of lewdness, fornication or unlawful sexual intercourse; or

(d) Knowingly transports any person to any place for the purpose of committing any lewd or indecent act or any act of prostitution; or

(e) Knowingly receives, offers or agrees to receive any person into any place or building for

the purpose of assignation or of performing any act of lewdness or fornication, or knowingly permits any person to remain there for such purposes; or

(f) Directs any person to any place for the purpose of committing any lewd or indecent act or any act of prostitution or fornication; or

(g) In any way aids or abets or participates in the doing of any of the acts prohibited by subdivisions (a) to (f), inclusive, of this section.

Municipal Code of San Francisco, §16:

"Any person violating any of the provisions or failing to comply with any of the mandatory requirements of the Municipal Code shall be guilty of a misdemeanor. Any person convicted of a misdemeanor under the provisions of the Municipal Code, unless provision is otherwise made, shall be punishable by a fine of not more than Five Hundred ($500) Dollars or by imprisonment in the County Jail for a period of not more than six (6) months or by both such fine and imprisonment."

Municipal Code of San Francisco (Police Code, §225):

"It shall be unlawful for any person on any public street or highway or elsewhere, to solicit, by word, act, gesture, knock, sign or otherwise, any person for the purpose of prostitution."

Municipal Code of San Francisco (Police Code, §226):

"Any person violating the provisions of Section 225 of this Article shall be guilty of a mis-

demeanor, and upon conviction thereof, shall be punished by a fine not to exceed One Hundred ($100.00) Dollars, or by imprisonment for not more than fifty (50) days, or by both such fine and imprisonment."

QUESTIONS PRESENTED.

(a) Whether the holding by the Supreme Court of the State of California that section 640 of the Penal Code of the State of California is valid and applicable under the facts is, as appellant contended, repugnant to the Fourth and Fourteenth Amendments to the Constitution of the United States and the Federal Communications Act (47 U.S.C., §605).

(b) Whether the holding by the Supreme Court of the State of California that section 182 of the Penal Code of the State of California is valid and applicable under the facts is, as appellant contended, repugnant to the Fourteenth Amendment to the Constitution of the United States.

(c) Whether the holding of the Supreme Court of the State of California that section 240(a) of the Police Code of the City and County of San Francisco, State of California, is valid and applicable under the facts is, as appellant contended, repugnant to the Fourteenth Amendment to the Constitution of the United States.

(d) Whether the holding the Supreme Court of the State of California that section 25 of article IV

and section 11 of article I of the Constitution of California are and each of them is valid and applicable under the facts is, as appellant contended, repugnant to the Fourteenth Amendment to the Constitution of the United States.

(e) Any other denial of federal right whether or not capable in itself of being brought to the Supreme Court of the United States by appeal.

STATEMENT OF THE CASE.

Appellant was convicted in the trial court of felony conspiracy (California Penal Code, § 182), subjecting her to imprisonment in a State prison for not more than three years, for conspiring to violate a local ordinance (San Francisco Police Code, §640(a)), violation of which was a misdemeanor subjecting the offender to imprisonment in a county jail for not more than six months.

The criminal acts for which appellant was convicted were conceived, instigated and caused by the chief of the "Super Vice Squad" of the San Francisco Police Department. (T. 37-39.) He induced Frank Lombardi, a friend of appellant, to telephone her from the District Attorney's office and solicit her to get a girl to go to a hotel room to engage in prostitution with a friend of Lombardi. Two members of the "Super Vice Squad", acting under directions of their chief, were assigned to a hotel room. From there, one of them, posing as Lombardi's friend, telephoned appel-

lant and confirmed her conversation with Lombardi. He also solicited her to get another girl for another friend. A record of what appellant said in this conversation was the product of wire-tapping, one of the officers testifying that a tape recorder was hooked to the telephone (T. 17) and disconnected after the conversation was recorded (T. 37). The two girls arrived at the hotel and were willing to work as prostitutes. The officers paid them some money and then arrested them. One of the officers subsequently married one of the girls. (T. 14.)

Before the trial and at the time of trial the California Supreme Court was firmly committed to the rule of violence sanctioning admissibility of evidence no matter how illegally obtained. After trial, however, the California Supreme Court prodded by the decision of this Court in *Irvine v. California,* 347 U.S. 128, 132, 74 S. Ct. 381, 98 L. Ed. 561, supplanted the rule of violence with the just rule that "evidence obtained in violation of the constitutional guarantees is inadmissible". (*People v. Cahan,* 44 Cal. 2d 434, 445, 282 P. 2d 905.)

Before the trial and at the time of trial the higher courts in California were also holding that although the Federal Communications Act (47 U.S.C., §605) was applicable and controlling in state proceedings, evidence obtained in violation of that Act was nevertheless admissible in California courts because of the rule of violence to which the California Supreme Court was then committed. (*People v. Kelley,* 22 Cal. 2d 169, 173-174, 137 P. 2d 1; *People v. Vertlieb,* 22

Cal. 2d 183, 196, 137 P. 2d 437; *People v. Channell,* 107 Cal. App. 2d 192, 199-200, 236 P. 2d 654.)

It is thus apparent that the state of the California law was such at the time of trial that it would have been a sleeveless errand for appellant to object to the admission of evidence on the ground that it was illegally obtained. Admittedly some of the questions here involved were not initiated in the trial court, but were initiated in appellant's opening brief which was filed in the California Supreme Court after the decision of that court in *People v. Cahan,* 44 Cal. 2d 434, 445, 282 P. 2d 905, had remodeled the California law on illegally obtained evidence. Appellant therefore invokes the rule of *Charleston Federal Savings & Loan Assn. v. Anderson,* 324 U.S. 182, 185-186, 65 S. Ct. 624, 89 L. Ed. 857, that where the question of validity of a statute was considered and decided by the court below, this Court will not pause to inquire how and when the question of the validity of the statute was raised.

The question of the validity and efficacy of California Penal Code §182 to convert into felony a conspiracy to commit a misdemeanor by violating a local ordinance was raised by demurrer to the indictment before appellant entered her plea of not guilty. (T. 5-7.)

And the question of entrapment was raised in the trial court by two instructions requested by appellant giving the defense to the jury. (T. 7-8.) The trial court refused to give them and told the jury that "the legal defense of entrapment is not applicable

to this case, and you may not therefore consider such a defense in your deliberations". (T. 81.)

THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

1. The California Supreme Court held California Penal Code §640 consistent with the Constitution and laws of the United States.

Here, as in earlier cases, the California Supreme Court held that the Federal Communications Act (47 U.S.C., §605) was applicable and controlling in state proceedings. The soundness of that holding is to be doubted in view of the holding of this Court in *Schwartz v. State of Texas,* 344 U.S. 197, 203, 73 S. Ct. 232, 235, 97 L. Ed. 231. The California Supreme Court also held that the facts showed no violation of the Federal Communications Act. The unsoundness of that holding is not subject to doubt. Violation was plain. A tape recorder was connected or hooked to a telephone and thereby a record was clandestinely made of what was said by the sender of a message over the telephone. Here, unmistakably, was the "dirty business" of wire-tapping. (*Nardone v. United States,* 302 U.S. 379, 380-382, 58 S. Ct. 275, 276, 82 L. Ed. 314; *Nardone v. United States,* 308 U.S. 338, 339-341, 60 S. Ct. 266, 267-268, 84 L. Ed. 307; *Weiss v. United States,* 308 U.S. 321, 329-331, 60 S. Ct. 269, 272-273, 84 L. Ed. 298; *United States v. Polakoff,* 2 Cir. 1940, 112 F. 2d 888, 889.) In *People v. Cahan,* 44 Cal. 2d 434, 438, 282 P. 2d 905, where wire-tapping was involved, the California Supreme Court said:

> "The Fourth Amendment to the Constitution of the United States provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . . Although this amendment, like each of the other provisions of the original Bill of Rights, applies only to the federal government (*Barron v. Baltimore,* 7 Pet. (U.S.) 243, 8 L. Ed. 672; *Adamson v. California,* 322 U.S. 46, 51, 67 S. Ct. 1672, 91 L. Ed. 1903, 171 A.L.R. 1223), "(t)he security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in "the concept of ordered liberty" (*Palko v. Connecticut,* 302 U.S. 319, 324-325, 58 S. Ct. 149, 82 L. Ed. 288) and as such enforceable against the States through the Due Process Clause (of the Fourteenth Amendment).' (*Wolf v. Colorado,* 338 U.S. 25, 27-28, 69 S. Ct. 1359, 93 L. Ed. 1782.)"

To uphold the validity of California Penal Code §640 as against the Fourth and Fourteenth Amendments to the Constitution and the Federal Communications Act (47 U.S.C., §605), as applied to the facts of this case, the California Supreme Court found it necessary to conclude that because a police officer who tapped the wire was also a party to the conversation tapped and recorded, there was no "clandestine" or "unauthorized" wire-tapping within the meaning of those words in the section.

The conclusion utterly disregards the rights of the sender of the tapped message, and is unsound under the decisions earlier cited and repugnant to the pro-

visions of the Constitution and laws of the United States applied or approved therein.

2. The California Supreme Court held California Penal Code §182 consistent with the Constitution of the United States.

Penal Code §182 denounces as a felony any conspiracy to commit any crime. Earlier decisions of the California appellate courts have indicated that the term "any crime" found in the section has the meaning of any crime punishable by the California Penal Code or by State law or statute. (*Doble v. Superior Court,* 197 Cal. 556, 565, 241 P. 860; *People v. Shah,* 91 Cal. App. 2d 716, 721, 205 P. 2d 1081; *People v. Severino,* 122 Cal. App. 2d 172, 183-194, 264 P. 2d 656.) On occasion, the Legislature has limited the scope of §182 by enacting statutes specifically making it a misdemeanor to conspire to commit a specified misdemeanor. (*In re Williamson,* 43 Cal. 2d 651, 654-655, 276 P. 2d 593.)

The thrust of the present decision is obvious. It extends the meaning of "any crime" in Penal Code §182 to include any act denounced as a misdemeanor by any local ordinance. To illustrate, it is now the law of California established by the decision herein that it is a felony, subjecting the offender to imprisonment up to three years in a state prison, to conspire to violate a local ordinance regulating parking and subjecting a violator thereof to a maximum penalty of a $5 fine.

Repugnancy to the Due Process and Equal Protection provisions of the Fourteenth Amendment, is manifest.

3. The California Supreme Court held section 240 (a) of the San Francisco Police Code consistent with the Constitution of the United States.

To illustrate the unequal protection of the laws and the variant situations which would arise if a conspiracy to violate a local ordinance were a felony, four factual situations are presented:

(a) A and B conspire in San Francisco to violate section 240 in San Francisco.

(b) A and B conspire in Los Angeles to violate section 240 in San Francisco.

(c) A and B conspire in San Francisco to violate section 240 in Los Angeles.

(d) A and B conspire in Los Angeles to violate section 240 in Los Angeles.

In situation (a) A and B could be prosecuted in San Francisco and in situation (b) A and B might be prosecuted in Los Angeles but in situations (c) and (d) A and B could not be prosecuted anywhere because their agreement would not be a conspiracy to commit a crime. This would make it a felony to conspire in San Francisco to offer or agree to commit an act of prostitution in San Francisco but no crime at all to conspire to offer or agree to commit an act of prostitution in Los Angeles where it is impossible to violate section 240 of the San Francisco Police Code. Again, this would make it a felony to conspire in Los Angeles to offer or agree to commit an act of prostitution in San Francisco but no crime at all to conspire in Los Angeles to offer or agree to commit an act of prostitution in Los Angeles.

Extended to its logical absurdity, the doctrine that it is a felony to conspire to violate an ordinance would make a felon out of a wayfarer who conspired to talk to a motorman on a San Francisco streetcar in violation of a local ordinance, and a mere nuisance out of a wayfarer who conspired to talk to a motorman on a Los Angeles streetcar where there is no ordinance curbing such talk.

Repugnancy to the Due Process and Equal Protection provisions of the Fourteenth Amendment is further demonstrated.

4. The California Supreme Court held section 25, article IV, and section 11, Article I, of the California Constitution consistent with the Constitution of the United States.

These provisions of the California Constitution prohibit the Legislature from passing local or special laws for the punishment of crimes and misdemeanors and require all laws of a general nature to have uniform operation.

In so interpreting California Penal Code §182 as to make it a felony to conspire to commit a misdemeanor created by local ordinance purely local in scope and significance, the California Supreme Court necessarily interpreted these provisions of the California Constitution as empowering the Legislature to enact said §182 as the Court interpreted it.

Manifestly, such interpretation renders the provisions of the California Constitution repugnant to the Fourteenth Amendment to the Constitution of the United States.

5. Denial of federal right whether or not capable in itself of being brought to the Supreme Court of the United States by appeal.

Some of the points here urged were not urged in the trial court for at the time of trial California law had been thoroughly settled against such points for many years. Only a radical change in the California law pending the appeal has permitted them to be urged on the appeal to this Court. If failure to "protect" the record has rendered such points inappropriate to appeal, or if points here urged are inappropriate to appeal for other reasons, appellant prays the indulgence of the Court and the granting of certiorari.

One of the grounds urged is obviously inappropriate to appeal and that is the ground of entrapment. That the criminal acts for which appellant was convicted were conceived, instigated, and caused by the chief of the "Super Vice Squad" of the San Francisco Police Department (T. 37-39), seems obvious. At worst, the question of entrapment was debatable. Due process of law required the trial court to instruct the jury on every theory of defense disclosed by the evidence, no matter how weak. (*People v. Carmen,* 36 Cal. 2d 768, 773, 228 P. 2d 281; *People v. Sanchez,* 35 Cal. 2d 522, 528, 219 P. 2d 9.) Due process of law under the Fourteenth Amendment was no less exacting. (*Lyons v. State of Oklahoma,* 322 U.S. 596, 601, 602, 605, 64 S. Ct. 1208, 1212-1213, 88 L. Ed. 1481.) The conclusion here is inevitable that apellant was denied due process of law by the action of the trial court in taking from the jury her defense of entrapment.

CONCLUSION.

Appellant respectfully submits that enough has been said to demonstrate that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Dated, San Francisco, California,
June 20, 1956.

Respectfully submitted,
LESLIE C. GILLEN,
JOHN R. GOLDEN,
Counsel for Appellant.

(Appendix A Follows.)

Appendix A

(Vol. 46 A.C. 57.)

[Crim. No. 5761. In Bank. Jan. 27, 1956.]

THE PEOPLE, Respondent, v. MABEL MALOTTE, Appellant.

[1] Privacy—What Constitutes Violation of Right.—When a person discusses the commission of a crime with another, face to face or at a distance through the use of any means of communication, there is no unreasonable invasion of privacy when the other uses the conversation against him.

[2] Telegraphs and Telephones—Crimes.—Where a conversation was recorded by police officers at the moment it reached the intended receiver, there was no interception within the meaning of the Federal Communications Act, § 605, prohibiting any person not authorized by the sender to intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to anyone.

[3] Id.—Crimes.—There is no learning of the contents of a communication "fraudulently, clandestinely, or in any other unauthorized manner" in violation of Pen. Code, § 640, prohibiting tapping or an unauthorized connection with a telegraph or telephone line, when one participant to the conversation consents to or directs its overhearing or preservation.

[4] Criminal Law—Defenses—Entrapment.—Where an accused had a preexisting criminal intent, the fact that when solicited by a decoy he committed a crime raises no inference of unlawful entrapment.

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[1] Right of privacy, notes, 138 **A.L.R.** 22; 168 **A.L.R.** 446; 14 **A.L.R.2d** 750. See also **Cal.Jur. 10-Yr.Supp.** (1949 Rev.), Privacy, § 2; **Am.Jur.**, Privacy, § 20 et seq.

[2] See **Cal.Jur.**, Telegraphs and Telephones, § 33 et seq.; **Am.Jur.**, Telegraphs and Telephone, § 65.

[4] Entrapment to commit crime with view to punishment therefor, notes, 18 **A.L.R.** 146; 66 **A.L.R.** 478; 86 **A.L.R.** 263. See also **Cal.Jur.2d**, Criminal Law, § 200 et seq.; **Am.Jur.**, Criminal Law, § 304.

McK. Dig. References: [1] Privacy, § 2; [2, 3] Telegraphs and Telephones, § 4; [4] Criminal Law, § 50; [5] Criminal Law, § 761 [6, 9] Conspiracy, § 5; [7] Conspiracy, § 3; [8] Criminal Law, § 58; [10] Municipal Corporations, § 237.

[5] **Id.—Instructions—Defenses—Entrapment.**—Where there is a complete absence of any evidence of unlawful entrapment, no instruction on the subject need be given.

[6] **Conspiracy—Criminal—Particular Conspiracies.**—Defendant was not improperly charged with a conspiracy to violate a municipal police code section prohibiting an offer or agreement to commit an act of prostitution on the ground that she can only be charged with a conspiracy to violate another municipal police code section prohibiting one from soliciting any person for the purpose of prostitution, since the two code sections set forth separate offenses, the first making the offer or agreement one's own, while the other relates to solicitation for another.

[7] **Id.—Criminal—Overt Act.**—A conspirator does not have to participate in the crime charged.

[8] **Criminal Law—Principles—Aiders and Abetters.**—Conspiracy is not synonymous with aiding or abetting or participating; it implies an agreement to commit a crime, while to aid and abet requires actual participation in the act constituting the offense.

[9] **Conspiracy—Criminal—Particular Conspiracies.**—Pen. Code, § 182, occupies the field of conspiracy and prohibits a conspiracy "to commit any crime," and in prescribing the punishment for conspiracies to commit misdemeanors, no distinction is drawn between misdemeanors defined by city ordinances and those defined by statute.

[10] **Municipal Corporations—Ordinances—Conflict With Statutes.**—Although the Legislature can make exceptions to the statutes enacted by it, inferior legislative bodies cannot. (Const., art. XI, § 11.)

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. John B. Molinari, Judge. Affirmed.

Prosecution for conspiring to commit a misdemeanor and for contributing to the delinquency of a minor. Judgment of conviction affirmed.

Leslie C. Gillen and John R. Golden for Appellant.

Edmund G. Brown, Attorney General, Clarence A. Linn, Chief Assistant Attorney General, and Raymond M. Momboisse, Deputy Attorney General, for Respondent.

TRAYNOR, J.—Mabel Malotte appeals from a judgment of conviction entered on a jury verdict finding her guilty of conspiring to commit a misdemeanor (Pen. Code, §182), and of contributing to the delinquency of a minor (Welf. & Inst. Code, §702.) She also appeals from the order denying her motion for a new trial.

On March 10, 1954, Frank Lombardi, at the request of the police, made a telephone call from the district attorney's office in San Francisco. He identified himself and said, "Say, listen Mabel; a friend of mine will be in town tonight, and he will call you. His name is Leonard Windsor. Can you take care of him?" This telephone call was not recorded and the officers present were unable to hear the party at the other end of the line.

At about 8 o'clock that night Inspectors O'Haire and McGuire of the San Francisco Police Department went to room 712 at the Sir Francis Drake Hotel, where they had previously registered. They placed a recording apparatus under one of the beds and connected it to an induction coil, a device designed to overhear a telephone conversation without the necessity of making physical connection with the telephone electrical circuit. Inspector O'Haire then placed a call

to Prospect 6-3267, and defendant answered. Their conversation was as follows:

"Hello.

"Is this Mrs. Malotte?

"Yes.

"Uh—this is—uh—Leonard Windsor.

"Yes.

"Uh—Mr. Frank Lombardi told me to get in touch with you this evening.

"Yes; he told me.

"He did?

"Yes.

"Well, I'm staying up at—uh—Sir Francis Drake, room 712.

"All right.

"And—uh—I have my friend, Mr. Bacci.

"Uh—no, he didn't. But I'll—I'll take care of it. What's the name, did you say?

"Bacci.

"All right. I'll—uh—what time do you want them, right now?

"Well, not right at the moment. In about an hour, half an hour, an hour.

"That'll be fine. All right, I'll take care of it.

"Yes, what time shall we expect them, in half an hour, an hour?

"In about an hour will be fine.

"An hour?

"Yes.

"All right.

"Okay.

"All right.
"Bye."

About an hour after the telephone call Yola Boles, a minor, came to the hotel room and introduced herself as Adele. The second girl failed to appear, and Yola gave the officers another telephone number, which they called to ask about the delay. Defendant also answered this call and told them that the other girl would be along in a few minutes.

In the meantime, Mary Madsen, the other girl, thinking she saw a plainclothesman following her, called defendant for instructions. Defendant called the hotel room and asked to speak to "Adele," but was told that she was occupied. Mary again called defendant, as she had been instructed to do on her previous call, and was told that there was nothing wrong and to go on up. Mary, however, refused to enter the hotel unescorted. Defendant told her to call the room and have the customer come down to meet her. Mary called the room, asked O'Haire to come down, and asked him to call defendant. O'Haire made the call and was told by defendant, "Well, I have the girl on the other phone now and she will meet you across the street in the Owl Drug Store." None of these subsequent calls were recorded, nor were they overheard by anyone except the parties thereto.

Inspector O'Haire met Mary at the Owl Drug Store and returned with her to the room. The girls were paid $25 each. They disrobed and got into the beds. The officers took badges from their luggage, identified themselves as officers, and placed the girls

under arrest. Then they went to defendant's apartment and waited outside overnight until a warrant could be secured for her arrest. When they secured the warrant, they demanded admittance, explained their purpose, and forced the door when she refused to answer. (See Pen. Code, §844.) They found her hiding in the attic.

Defendant contends that the evidence of the recorded phone call was inadmissible on the ground that it was obtained in violation of her constitutional rights and in violation of federal and California statutes. She maintains that without the interpretation the recorded call gives to the subsequent transactions no conspiracy is established, leaving inadmissible the extrajudicial acts and declarations of the girls, alleged coconspirators, and uncorroborated Mary's testimony, concerning her agreement with defendant to serve as a prostitute for her.

The attorney general, relying on *Olmstead v. United States,* 277 U.S. 438 [48 S.Ct. 564, 72 L.Ed. 944, 66 A.L.R. 376], and *Goldman v. United States,* 316 U.S. 129 [62 S.Ct. 993, 86 L.Ed. 1322], contends that the overhearing of the telephone conversation by means of the induction coil was not a search and seizure within the meaning of the Fourth Amendment to the Constitution of the United States and article I, section 19, of the California Constitution. It is unnecessary to determine whether those cases have been unsettled by *Irvine v. California,* 347 U.S. 128 [74 S.Ct. 381, 98 L.Ed. 561], for there is a basic difference between the conduct of the officers in that case and the

conduct of Inspectors O'Haire and McGuire, herein. In the Irvine case there were several trespasses when the microphone was installed and subsequently moved in the Irvine home, and an "incredible" invasion of the right to privacy through the eavesdropping over the microphone. The officers monitored indiscriminately not only the conversations pertaining to gambling, but those involving every phase of the Irvine's personal affairs. The technique used by the officers made selectivity impossible. In the present case there was neither trespass nor indiscriminate eavesdropping. Unlike the Irvine case, nothing was overheard but the free discussion of a crime by one who thought her listener a client. **[1]** When a person discusses the commission of a crime with another, face to face or at a distance through the use of any means of communication, there is no unreasonable invasion of privacy when the other uses the conversation against him.

Defendant contends, however, that the evidence was obtained in violation of the Federal Communications Act (47 U.S.C.A., §605), and section 640 of the California Penal Code and that it was, therefore, inadmissible under the rule of *People v. Cahan,* 44 Cal.2d 434 [282 P.2d 905].

Section 605 of the Federal Communications Act provides: ". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; . . ." A majority of the federal courts

define "intercept" as used in section 605 to mean "to take or seize by the way, or before arrival at the destined place," and hold that there is no interception when the intended receiver consents to or directs the overhearing of the communication at the moment it reaches him. (*United States v. Yee Ping Jong*, 26 F. Supp. 69, 70; *United States v. Lewis*, 87 F.Supp. 970, 973, reversed on other grounds *sub nom. Billeci v. United States*, 184 F.2d 394; *United States v. Sullivan*, 116 F.Supp. 480, 482; *United States v. Pierce*, 124 F. Supp. 264, 267; and see dissent of Clark, J. to *United States v. Polakoff*, 112 F.2d 888, 891; *cf. United States v. Polakoff, supra*, 112 F.2d 888, 889; *United States v. Stephenson*, 121 F.Supp. 274, 277.) The United States Supreme Court, approving this definition in the Goldman case, *supra*, 316 U.S. 129, 134, went on to say: "[Intercept] does not ordinarily connote the obtaining of what is to be sent before, or at the moment, it leaves the possession of the proposed sender, or after, or at the moment, it comes into the possession of the intended receiver." (See *Reitmeister v. Reitmeister*, 162 F.2d 691.) **[2]** Thus, as in the present case, where the conversation was recorded by the officers "at the moment" it reached the "intended receiver," there was no interception within the meaning of section 605 of the Federal Communications Act. **[3]** There was likewise no invasion of privacy in violation of section 640 of the Penal Code.[1] There is no learning of the contents of

[1] "Every person who, by means of any machine, instrument, or contrivance, or in any other manner, willfully and fraudulently, or clandestinely taps, or makes any unauthorized connection with any telegraph or telephone wire, line, cable, or instrument under the control of any tele-

a communication "fraudulently, clandestinely, or in any other unauthorized manner" when one of the participants to the conversation consents to or directs its overhearing or preservation. (See *People v. Channel,* 107 Cal.App.2d 192, 200 [236 P.2d 654].)

Defendant complains that the trial court erred in refusing to instruct the jury on the defense of entrapment. A substantial part of the conversation between Frank Lombardi and defendant, and all of that between Inspector O'Haire and defendant is quoted above. Neither conversation, nor any testimony brought out at the trial by defendant or the People shows more than the creation of an opportunity for defendant to act on her preexisting criminal intent. **[4]** "Where an accused has a preexisting criminal intent, the fact that when solicited by a decoy he committed a crime raises no inference of unlawful entrapment." (*People v. Schwartz,* 109 Cal.App.2d 450, 455 [240 P.2d 1024], quoted with approval in *People v. Braddock,* 41 Cal.2d 794, 802 [264 P.2d 521].) **[5]** Thus, as in this case, where there is a complete absence of any evidence of unlawful entrapment, no instruction on the subject need be given. (*People v. Alamillo,* 113 Cal.App.2d 617, 621 [248 P.2d 421]; *People v. Jackson,* 106 Cal.App.2d 114, 125 [234 P.2d 766]; *People v. Harris,* 80 Cal.App. 328, 331 [251 P. 823].)

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graph or telephone company; or who willfully and fraudulently, or clandestinely, or in any other unauthorized manner, reads or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any telegraph or telephone wire, line, or cable, or is being sent from, or received at any place within this State . . . , is punishable [by fine and imprisonment.]"

[6] Defendant also contends that even if we admit the evidence to which she objects, the judgment must be reversed on the ground that she was improperly charged with a conspiracy to violate section 240, subdivision (a), of the Police Code of San Francisco. She claims that section 225[2] of the Police Code defines the same offense as does section 240,[3] and argues that since section 225 provides a lesser penalty, she can only be charged with a conspiracy to violate that section. The two sections set forth separate offenses. One can solicit for another (§225), but the offer or agreement to commit an act of prostitution is one's own. (§240, subd. (a).) **[7]** Defendant contends that if the sections are not the same, and if section 240, subdivision (a), is construed as referring to an act of prostitution to be committed by the one making the offer or agreement, the evidence shows only a conspiracy to violate section 225 and not section 240, subdivision (a), since she did not offer or agree to commit an act of prostitution. The answer to this contention is that a conspirator does not have to participate in the crime conspired.

Finally, defendant contends that the felony charge was improper and that she should have been sentenced and convicted for a misdemeanor only, on the ground that subsection (g) of section 240 of the Police Code, which makes it a misdemeanor to aid or abet or par-

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[2] "It shall be unlawful for any person on any public street or highway or elsewhere, to solicit, by word, act, gesture, knock, sign or otherwise, any person for the purpose of prostitution."

[3] "Every person is guilty of a misdemeanor who: (a) Offers or agrees to commit any lewd or indecent act or any act of prostitution; . . ."

ticipate in the doing of any of the acts prohibited by section 240, should be construed as prohibiting a conspiracy to violate section 240. **[8]** Conspiracy, however, is not synonymous with aiding or abetting or participating. Conspiracy implies an agreement to commit a crime; to aid and abet requires actual participation in the act constituting the offense. (*People v. Bond,* 13 Cal.App. 175 [109 P. 150].) **[9]** Moreover, section 182 of the Penal Code occupies the field of conspiracy and prohibits a conspiracy "to commit any crime." In prescribing the punishment for conspiracies to commit misdemeanors, no distinction is drawn between misdemeanors defined by city ordinance and those defined by statute. The case of *In re Williamson,* 43 Cal.2d 651 [276 P.2d 593], holding section 7030 of the Business and Professions Code, dealing with conspiracies to violate certain licensing provisions of that code, to be an exception to the general conspiracy provisions of section 182 of the Penal Code, is not in point, for section 240, subdivision (g), of the Police Code of San Francisco cannot be considered such an exception. **[10]** Although the Legislature can make exceptions to the statutes enacted by it, inferior legislative bodies cannot. (Cal. Const., art. XI, §11; *Pipoly v. Benson,* 20 Cal.2d 366, 370 [125 P.2d 482, 147 A.L.R. 515], and cases cited therein.) Thus, defendant was properly charged with and convicted of a felony.

The judgment and order are affirmed.

Shenk, J., Spence, J., and McComb, J., concurred.

CARTER, J.—I dissent.

I am of the opinion that the judgment should be reversed for failure to instruct the jury on the defense of entrapment. There is evidence in the record which would support a verdict based on that defense. The police officers induced Frank Lombardi, a friend of defendant, to solicit her to commit the criminal act here involved.

The police officer involved in the entrapment testified:

"Q. You, either alone or with the assistance of someone else conceived the idea of setting into motion a set of circumstances to cause someone to commit a crime, isn't that correct? . . . A. Yes."

After the solicitation by Lombardi the police officers posed as decoys and made further solicitation of defendant which culminated in the consummation of the crime. The jury could have concluded that the police originated and set in motion a scheme to *cause* defendant to commit a crime. This could be interpreted to mean that regardless of the innocent or guilty frame of mind of the victim, the police sought to cause her to commit a crime. This purpose was carried out, the first step being a telephone call by Lombardi to defendant asking her to violate the law. In *Cline v. United States,* 20 F.2d 494, defendant procured a narcotic for a dope addict upon the solicitation of the latter whom he knew and who was acting in fear of the police in making the solicitation. The court held there was entrapment as a matter of law. In *United*

States v. Eman Mfg. Co., 271 F. 353, the government agent, pretending to be a customer for defendant's medicinal product, "Sulfox," wrote to defendant asking it to send him some. Defendant did so but misbranded the Sulfox which constituted a violation of the food and drug laws when the article was placed in interstate commerce. The court held there was entrapment. In *People v. Gallagher*, 107 Cal.App. 425 [290 P. 504], the officers had Dall, an addict and seller of drugs, solicit defendant, an addict, to buy drugs. The drug was left on the street, and, at Dall's request, defendant paid for it and picked it up whereupon he was arrested for illegal possession. The judgment of conviction was reversed for failure to instruct on entrapment, the court stating (p. 429): "It must be borne in mind that appellant was not charged with having sold or bargained to sell any drugs; nor was any evidence whatever introduced to show that such was his intention. The present case, therefore, is quite different from those upon which respondent seems to rely, showing that a defendant was already in the illegal possession of an article, but was entrapped into selling it. In the case at bar the theory of appellant's defense was that the possession by him of said drug was brought about solely through the instrumentalities of the state's agent and those working under him, for the very purpose of causing his arrest. As said in the case of *In re Moore*, 70 Cal. App. 483 [233 P. 805, 806], 'It may be conceded that it would be violative of sound public policy and repugnant to good morals to uphold the conviction of

a person who, being entirely innocent of any intention to commit a crime, was inveigled into its commission by an officer of the law or by a private detective hired for that purpose by some self-constituted guardian of the public morals. (*People v. Barkdoll,* 36 Cal.App. 25 [171 P. 440].)' "

My views on entrapment were expressed in my dissent in *People v. Braddock,* 41 Cal.2d 794, 803 [264 P.2d 521].

For the foregoing reason I would reverse the judgment.

Schauer, J., concurred.

No. 188. MALOTTE *v.* CALIFORNIA. Appeal from the Supreme Court of California. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Leslie C. Gillen* and *John R. Golden* for appellant. Reported below: 46 Cal. 2d 59, 292 P. 2d 517.